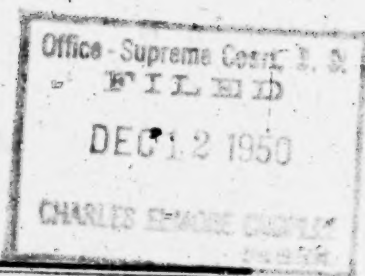


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# Supreme Court of the United States

OCTOBER TERM, 1950

NO. 147

THE STATE OF WEST VIRGINIA, at the Relation of  
DR. N. H. DYER, et al., etc., Petitioners,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia.

## SUPPLEMENTAL MEMORANDUM.

CHARLES J. MARGIOTTI,  
Attorney General.

HARRY F. STAMBAUGH,  
Special Counsel.

M. VASHTI BURR,  
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Pennsylvania.

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## SUPPLEMENTAL MEMORANDUM.

IN THE ABSENCE OF A PROVISION TO THE CONTRARY,  
EXPRESS OR IMPLIED, A STATE MAY NOT WITHDRAW FROM A  
COMPACT AT WILL.

The compact in this case contains no express provision as to its duration or termination or the withdrawal of a state. While we have found no decision of this court as to the right of withdrawal, it is our position that a state may not withdraw without the consent of all of the parties to the compact. This is the rule in private contracts. It is also the rule in treaties between nations:

Thus in McNair on The Law of Treaties (1938), the rule is stated:

"The normal basis of approach adopted in the United Kingdom towards a treaty is that it is intended to be of perpetual duration and incapable of

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unilateral determination, unless, expressly or by implication, the treaty contains a right of unilateral termination or some other provision for its coming to an end. There is nothing juridically impossible in the existence of a treaty creating obligations which are incapable of termination except by the agreement of all parties." (p. 351)

The subject matter of the compact in this case and the surrounding circumstances make it clear that a right of withdrawal was not intended and should not be implied. The compact sets up a program for the purification of streams—the lessening of pollution from sewerage and industrial wastes.

Such a program cannot be taken up one day and dropped the next. It will require at least a period of years for its successful consummation.

Furthermore, if one state should withdraw and thereafter permit the pollution of a stream, the people of the states below would suffer and the efforts of those states to lessen pollution would be largely defeated.

In order to implement the program it will be necessary to conduct an investigation to ascertain the sources of pollution. Extensive studies will have to be made to determine the best methods of eliminating pollution. Scientific and engineering experts will have to be employed to design plants for the disposal of sewerage and for the consumption or treatment of industrial waste. A municipality will have to provide the finances, perhaps by a vote of the people authorizing a bond issue, to pay the cost of the new installation. Industries too will have to invest substantial sums in equipment or plants for

the disposal or treatment of chemicals or other industrial wastes.

Pennsylvania is particularly interested in the continuance of West Virginia in this compact. No controversies have arisen between the two states. The only issue is a legal question.

The Statement in the brief filed by Pennsylvania in this case indicates that the head waters of the Monongahela River and much of the stream itself lie in West Virginia and the waters flow through Pennsylvania. If Pennsylvania should enforce the installation of the purification process, and West Virginia should not do this, industries in West Virginia would have a comparative advantage over Pennsylvania. The West Virginia industrialist would not have to include the expenses of purification in its cost of production, nor would it have the additional capital investment in machinery and equipment for consumption or elimination of wastes. If West Virginia should withdraw, the compact would have much less value to Pennsylvania. Most of the other states lie down stream from Pennsylvania. Virginia and New York have a comparatively small amount of water shed which drains into the Ohio River Basin.

After the program is completely implemented, it will not produce a permanent or static condition in which pollution is perpetually eliminated. Continued enforcement of the compact will be necessary in order to preserve the gains accomplished by it.

We submit that neither in the language of the compact nor in the surrounding circumstances or the subject

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matter of the compact is there anything to support an implication of a right to withdraw or terminate.

If it be argued to the contrary, we submit—

**I.**

**IF IMPLICATION IS RESORTED TO, THE TREATY WOULD ENDURE FOR A REASONABLE TIME IN THE LIGHT OF ALL THE CIRCUMSTANCES AND THE NATURE OF THE SUBJECT MATTER OF THE COMPACT.**

The same limitation would be imposed on the right of withdrawal.

In *McNair, on The Law of Treaties*; the rule as to implied duration or right of withdrawal is stated as follows:

"Just as there is nothing juridically impossible in the existence of a treaty which is incapable of termination except by consent of all parties, so also there is nothing juridically impossible in the existence of an implied term giving a party the right to terminate it unilaterally by denunciation. It is a question of the intention of the parties which can be inferred from the terms of the treaty, the circumstances in which it was concluded, and the nature of the subject-matter. (pp. 362-363)

"One circumstance which would very much strengthen the general presumption of perpetual duration would be that the treaty in question is in part executed and in part executory." (p. 363)

The principle of this last sentence is applicable in this case. The work of implementing the compact will not precede *pari passu* or be synchronized in all of the

states which are parties. After one state has completed wholly or partially its part of the program, the implication should be clear that another state was not permitted to withdraw.

It may be argued that a different rule applies to *commercial treaties*. The compact in this case, however, is obviously not a *commercial* compact. Its provisions do not call for the passage of a single boat or article of trade over any stream. The compact requires purification of a stream even though no commercial use is made of it. The elimination or lessening of pollution is intended to make the waters of the stream useable for human consumption and recreation.

In *McNair*, on *The Law of Treaties*, the question of commercial treaties is discussed as follows:

"It is believed that the view now held is that, in the case of a treaty embodying a purely commercial bargain between the parties, the existence of an implied right of denunciation upon giving reasonable notice can readily be inferred from the very nature of the treaty on the ground that it requires revision from time to time in order to bring it into harmony with changing conditions. But in fact the United Kingdom Government has never yet claimed to exercise this right. (p. 367)

"It must, however, be noted that the opinion above stated as to the terminability of commercial treaties containing no express provision for denunciation relates only to commercial treaties *stricto sensu*, that is, treaties embodying a bilateral bargain on such matters as reciprocal freedom of commerce and navigation, traffic in transit, tariffs,

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most-favored-nation treatment, entry and residence of nationals and immunity from military duties and requisitions, registration of companies, consuls, etc." (p. 368)

"When a treaty does more than this and provides for a special regime, such as the conventions between the United Kingdom and the United States of America relating to the rights of the latter State and its citizens in the British Mandated Territories or where a *multi-partite treaty creates in a particular area a regime, apparently intended to be permanent*, of commercial equality for all nations, there is little doubt that other considerations would prevail and that any inference of terminability by unilateral denunciation would be negated. (p. 368) (Emphasis added)

See also *Brierly, The Law of Nations* (4th ed.), pp. 236, 239-240.

The rule in regard to the duration and terminability of private contracts is stated in *1 Williston on Contracts*, Sec. 389. We call attention to the concluding sentence of this Section 1, as follows::

"\* \* \* Nevertheless, not infrequently promises requiring continuing performance (other than contracts of service) have been interpreted as requiring performance for a reasonable time, or until terminated by a reasonable notice. All the circumstances of each case must be considered in reaching a conclusion. Especially if consideration for such a promise is partly executed a court will be reluctant to hold that the promise is determinable at the promisor's pleasure."

The compact in this case is a public contract between sovereign states, and the rule as to treaties, rather than the rule as to private contracts, should be applied.

However, we submit, that under either rule the compact in this case may not be terminated until the program for the abatement of pollution has been accomplished. That is the sole and indivisible purpose of the compact.

## II.

THIS COURT MUST DETERMINE FOR ITSELF WHETHER A COMPACT EXISTS BETWEEN THE STATES, INCLUDING WEST VIRGINIA.

Numerous decisions holding that this court will determine for itself the existence and construction of a contract, in order to determine whether its obligation has been impaired, are collected in 6 U. S. Supreme Court Digest, Courts, Secs. 848, 849, 849.5.

Under these decisions this court "will examine for itself the existence and meaning of the contract as well as the relation of the parties and the circumstances of its execution" (*Rapid Transit Corp. v. New York*, 303 U. S. 573, 593 (1938)).

It is equally important that this court determine for itself the existence of a compact with a particular state, after such compact has been approved by Congress and in view of the fact that Congress "was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power" (*Virginia v. West Virginia*, 246 U. S. 565 (1918)).

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The approval of Congress presumably is made only after that body determines that a compact has been executed by the signatory states.

If this act of Congress is not political, or is not conclusive on everyone, this court must determine whether the compact has been validly executed by the states and approved by Congress.

We again refer to the cases cited on pages 15-16 of our brief in which this court stated that "this Compact, by the action of Congress, has become a law of the Union".

If this compact is a law of the United States, then the rule applied in determining the duration of a statute should govern—that an act, if not limited in duration, continues in force until it is repealed (50 Am. Jur., Statutes, Sec. 513). In this case the compact would be in force until repealed by an Act of Congress and an act of the Legislature of each of the signatory states, or at least until Congress withdrew its approval.

Respectfully submitted,

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Special Counsel.

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